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Justice Against Sponsors of Terrorism: Why Suing Terrorists May Not be the Most Effective Way to Advance United States Foreign Policy Objectives

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Justice Against Sponsors of Terrorism: Why Suing Terrorists May Not be the Most Effective Way to Advance United States Foreign Policy Objectives

Drew Watkins¹

“In our system, the truth behind those facts deserves to be presented in a court—a court of law where fairness and justice will be assured. This measure does not prejudge a verdict or issue a judgment. It gives both sides a fair day in court.”²

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² 162 CONG. REC. S6167 (daily ed. Sept. 28, 2016) (statement of Sen. Blumenthal encouraging an override of President Obama’s veto).

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INTRODUCTION

The Justice Against Sponsors of Terrorism Act (JASTA) was enacted to allow the families of the victims of the September 11 terrorist attacks to sue the Saudi Arabian government for its alleged involvement in the 9/11 attacks.¹ It was passed by Congress on September 28, 2016, with overwhelming bipartisan support.² President Obama had previously vetoed the legislation, on September 23, 2016, after it passed through both houses without a single dissenting vote, but Congress acted quickly to override his veto by a vote of 97–1 in the Senate and 348–77 in the House of Representatives.³ While many argued against the passage of JASTA, the families of 9/11 victims who lost loved ones on September 11, 2001, lobbied Congress and President Obama to pass this legislation and send a clear message to the world: “If you support a terrorist attack against U.S. citizens in the United States of America, we will hold you accountable in a U.S. court.”⁴

The passage of this Act was viewed as an attempt to bring justice to the families of 9/11 victims and hold the Kingdom of Saudi Arabia accountable for its potential involvement in the terrorist activities of that day.⁵ However, the scope of JASTA was never limited to the September 11th attacks, and, as a result, it has much broader implications for sovereign immunity as a whole.⁶ The protections afforded by sovereign immunity are far reaching and complex. It is under this protection that our military service men and women can act around the globe without fear of litigation for the actions they take at the request of our government. It is also the concept of sovereign immunity, however, that has shielded other state actors from liability for their involvement in terrorist acts carried out on United States soil.⁷

Since 1976, the United States has adhered to the restrictive theory of sovereign immunity, which allows states to create limited exceptions to the immunity afforded to sovereigns.⁸ Supporters of JASTA argue that this act simply continues

¹ See generally Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 2, 130 Stat. 852 (2016).

² Seung Min Kim, *Congress Hands Obama First Veto Override*, POLITICO (Sept. 28, 2016, 1:45 PM), <http://www.politico.com/story/2016/09/senate-jasta-228841> [<https://perma.cc/6MHW-S5GY>].

³ *Id.*; Seung Min Kim, *Obama Vetoes Saudi 9/11 Bill*, Politico (Sept. 23, 2016, 5:35 PM), <http://www.politico.com/story/2016/09/obama-jasta-228548> [<https://perma.cc/FDC2-E36V>].

⁴ *Message from 9/11 Committee*, PASSJASTA.ORG, <http://passjasta.org/message-from-911-committee/> [<https://perma.cc/3X7S-8LUQ>] (last visited Oct. 12, 2017).

⁵ *Message from 9/11 Committee*, *supra* note 4; see also Terry Strada et al., *9/11 Families Pen Letter Urging Obama to OK Anti-Terrorism Bill*, N.Y. DAILY NEWS (Sept. 11, 2016, 5:41 PM), <http://www.nydailynews.com/news/politics/9-11-families-pen-letter-urging-obama-anti-terrorism-bill-article-1.2787663> [<https://perma.cc/KZE7-CR7X>].

⁶ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 7, 130 Stat. 852, 855 (2016).

⁷ See, e.g., James Risen, *Terrorist Claims Return Sept. 11 Suit to Spotlight*, N.Y. TIMES (Feb. 10, 2015), <https://nyti.ms/2jBnmur> [<https://perma.cc/VAC5-GF9R>].

⁸ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602–1611 (2012)).

that tradition by creating another limited immunity exception.⁹ JASTA critics argue, however, that this exception can be used by other states to justify similar legislation which would allow them to sue the United States and its men and women operating abroad.¹⁰ It was primarily this concern that led President Obama to veto the legislation.¹¹ Despite these concerns, Congress chose to override the Presidential veto and pass JASTA into law.

Principles of sovereign immunity have stood as a cornerstone of international law and intergovernmental relations for hundreds of years. There are serious concerns to be weighed and evaluated when looking at legislation that seeks to waive or alter this fundamental tenant of global relations. While the United States Congress almost certainly abdicated its responsibility for weighing these concerns when it passed JASTA,¹² these concerns must continue to be evaluated and considered for any new legislation that may impact sovereign immunity. Congress has a duty to protect our national security interests and to take immediate steps to minimize any international response to the passage of JASTA.

Part I of this Note discusses the history of sovereign immunity in the United States and the passage of the Foreign Sovereign Immunities Act (FSIA), which codifies limited exceptions to the sovereign immunities doctrine under United States law. Part II discusses the background of terrorism legislation in this country and what led to the passage of JASTA. Part III addresses the unintended consequences of this legislation and looks at arguments from both sides of the debate to determine whether JASTA is good policy. Part IV argues that even if the underlying policy of JASTA is laudable — to hold terrorists accountable for their action on United States soil — its methods for achieving this goal will be largely ineffective. Lastly, Part V discusses how the United States should advance sovereign immunity principles now that JASTA has been signed into law, including options for fixing JASTA, stopping the erosion of sovereign immunity around the world, and other ways to effectively bring the perpetrators of terrorist attacks on U.S. soil to justice.

⁹ See Lee Whitesell, *JASTA Not as Bad as It Seems*, NEW JURIST (Oct. 17, 2016), <http://newjurist.com/jasta-not-as-bad-as-it-seems.html> [<https://perma.cc/B9N9-WUBP>].

¹⁰ 162 CONG. REC. S6171–72 (daily ed. Sept. 28, 2016) (letter from Sen. Bob Corker (R-TN) et al. to Senators Cornyn and Schumer).

¹¹ See 162 CONG. REC. S6071–72 (daily ed. Sept. 26, 2016) (President Obama's veto message regarding JASTA).

¹² See 162 CONG. REC. S6071–72; see also 162 CONG. REC. S6171–72 (daily ed. Sept. 28, 2016) (“[C]oncerns have been raised regarding potential unintended consequences that may result from [JASTA] for the national security and foreign policy of the United States.”).

I. HISTORY OF SOVEREIGN IMMUNITY

The concept of sovereign immunity traces back to English common law.¹³ Based on the idea that “the king can do no wrong,” sovereign immunity developed as a judicial doctrine that limited the king’s exposure to suit.¹⁴ In the broadest sense, sovereign immunity provides a government with protection from being sued without its consent.¹⁵ Troy Daniels explains, “Historically, foreign states enjoyed absolute sovereign immunity under ‘traditional precepts of international law.’”¹⁶ “Absolute sovereign immunity is based on the long recognized concept ‘that each domestic sovereign waives its judicial power over foreign sovereigns in the interest of compelling intercourse among them’”¹⁷ In the United States, the Supreme Court has recognized sovereign immunity as an important international legal principle since the early 1800s.¹⁸ As Justice Marshall declared, a “common interest impelling [sovereign states] to mutual intercourse, and an interchange of good offices with each other,” requires the application of sovereign immunity.¹⁹

Eventually, the doctrine of sovereign immunity adapted from an absolute immunity to a restrictive immunity that recognized a few exceptions for commercial activities.²⁰ This has been the prevailing international view for several decades, as noted recently by the International Court of Justice.²¹ In 1976, Congress codified this principle of international law through the Foreign Sovereign Immunities Act (FSIA).²² These principles have served the United States well. Due to the sheer breadth of our global commitments around the world, the sovereign immunity doctrine serves to protect U.S. property that could otherwise be subject to foreign judgments.²³ Likewise, principles of sovereign immunity shield U.S. agents, service members, diplomats, and other assets from liability for actions which foreign actors may not like and may consider illegal.²⁴ It is easy to see that

¹³ John B. Ostrow & Joseph H. Lowe, *Sovereign Immunity*, 33 U. MIAMI L. REV. 1297, 1299 (1979).

¹⁴ Troy Daniels, *An Analysis of the United States Foreign Sovereign Immunities Act*, 4 DET. C. L. J. INT’L L. & PRAC. 175, 176 (1995).

¹⁵ *Sovereign Immunity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁶ Daniels, *supra* note 16, at 176.

¹⁷ *Id.*

¹⁸ *Schooner Exch. v. McFaddon*, 11 U.S. 116, 116–17, 135–37 (1812).

¹⁹ *Id.* at 137.

²⁰ Daniels, *supra* note 16, at 175.

²¹ *Jurisdictional Immunities of State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99, ¶ 59–61 (Feb. 3) (discussing the scope of sovereign immunity), <http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> [https://perma.cc/98X4-6QHT].

²² Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602–1611).

²³ *Justice Against Sponsors of Terrorism Act: Hearing on H.R. 2040 Before the Subcomm. on the Constitution & Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 64 (2016) (statement of Paul B. Stephan, Professor of Law, University of Virginia Law School).

²⁴ *See id.*

there is no bigger beneficiary to the principles of sovereign immunity than the United States.²⁵

II. SOVEREIGN IMMUNITY AND TERRORISM LITIGATION IN THE UNITED STATES

A. *The Foreign Sovereign Immunities Act (FSIA)*

Pamela Sue Malkin explains, “In 1976, the United States adopted the Foreign Sovereign Immunities Act (FSIA) which altered American law from the theory of absolute sovereign immunity to the restrictive concept of sovereign immunity.”²⁶ The FSIA represents a “codification of international law,” and provides for a number of exceptions to immunity “recognized by international practice.”²⁷ “Under the FSIA, foreign sovereigns are immune from suit for their actions, unless one of the specific, enumerated exceptions to immunity applies.”²⁸

The FSIA was “[e]nacted in response to increased foreign governmental involvement in the [global] marketplace.”²⁹ This legislation gave U.S. federal courts the authority to hear cases involving foreign governments when they “engage[d] in ‘commercial activity’ which has a direct effect in the United States.”³⁰ The FSIA was never intended to violate international law or customs. On the contrary, President Gerald Ford made clear after signing the FSIA into law that it “continues the long-standing commitment of the United States to seek a stable international order under the law.”³¹

In 1996, the FSIA was amended to permit litigation for acts of terrorism perpetrated by countries designated as “state sponsor[s] of terrorism.”³² In order to minimize any reciprocal effects of such an amendment, it was written narrowly to limit its application to countries the Secretary of State determines to have

²⁵ See *id.*

²⁶ Pamela Sue Malkin, Case Comment, *Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986), 11 SUFFOLK TRANSNAT’L L.J. 251, 251 (1987).

²⁷ Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193, 199–200 (2007); see also 28 U.S.C. § 1605 (2012 & Supp. III 2016).

²⁸ Felice A. Glennon, Case Comment, *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018 (9th Cir. 1987), 12 SUFFOLK TRANSNAT’L L.J. 703, 703 (1989). Most notably, the exceptions to sovereign immunity enumerated in the FSIA cover commercial activities and activities which result in money damages and occur entirely within the United States, the so called “territorial tort” exception. See generally 28 U.S.C. § 1605(a) (2012).

²⁹ Daniels, *supra* note 14, at 175.

³⁰ *Id.*

³¹ Gerald R. Ford, *Statement on Signing the Foreign Sovereign Immunities Act of 1976*, (October 22, 1976), Gerhard Peters & John T. Wooley, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=6506> [<https://perma.cc/K8VH-36D9>] (last visited Oct. 14, 2017).

³² 28 U.S.C. § 1605(a)(7) (1996) (repealed 2008 and codified at 28 U.S.C. § 1605A (2012)); see also JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 1 (2008).

“repeatedly provided support for acts of international terrorism.”³³ But even this narrowly tailored amendment does not comport with generally accepted international law.³⁴ As a result, other governments have labeled the United States a sponsor of terrorism, making U.S. agents and agencies operating abroad potential targets for foreign litigation.³⁵

The threat of foreign litigation, as a result of reciprocal erosions of sovereign immunity, is not simply theoretical. At least two countries have passed legislation to remove U.S. sovereign immunity in their courts in response to legislation enacted by the United States.³⁶ Cuba has allowed suits to be brought against the United States for human rights violations, which has resulted in billions of dollars in damages against the United States.³⁷ Iran has also allowed lawsuits to proceed against the United States for what Iran perceives to be terrorist activities.³⁸ In fact, one Iranian businessman who received a half a billion dollar judgment against the United States reportedly tried to attach the vacant U.S. embassy in Tehran to satisfy his judgment.³⁹

Additionally, several suits have been brought against U.S. officials in Europe over the last decade for their roles in fighting terrorism. In 2009, for example, several American CIA and State Department officials were convicted in absentia by

³³ 28 U.S.C. § 1605A (2012). The countries that are designated as State Sponsors of Terrorism change periodically. Currently, this list includes Iran, Sudan, and Syria. *State Sponsors of Terrorism*, U.S. DEP’T ST., <https://www.state.gov/j/ct/list/c14151.htm> [<https://perma.cc/FWU5-7L2Q>] (last visited Oct. 14, 2017). North Korea was added back to the list of State Sponsors of Terrorism on November 20, 2017 after being removed in 2008. Michael D. Shear & David E. Sanger, *Trump Returns North Korea to List of State Sponsors of Terrorism*, N.Y. TIMES (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/us/politics/north-korea-trump-terror.html>. Cuba was removed from the list most recently, in 2015. Julie Hirschfeld Davis, *U.S. Removes Cuba from State-Sponsored Terrorism List*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/2015/05/30/us/us-removes-cuba-from-state-terrorism-list.html> [<https://perma.cc/66FH-YULW>].

³⁴ See *Evaluating the Justice Against Sponsors of Terrorism Act: Hearing on S. 2930 Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 8–9 (2010) (statement of John B. Bellinger III, Partner, Arnold & Porter LLP).

³⁵ *Id.*

³⁶ ELSEA, *supra* note 32, at 56.

³⁷ *Id.*

³⁸ *Id.*; see also Michael Theodoulou, *Tehran Court Rules Against US*, CHRISTIAN SCI. MONITOR (Feb. 3, 2003), <https://www.csmonitor.com/2003/0203/p06s01-wome.html> [<https://perma.cc/VCT5-9G3R>].

³⁹ Mike Theodoulou, *Iran Court to Strip U.S. of Embassy?*, SEATTLE TIMES (Dec. 3, 2006, 8:48 PM), <http://www.seattletimes.com/nation-world/iran-court-to-strip-us-of-embassy/> [<https://perma.cc/6E45-PWSV>]. The United States argued that, “under the Vienna Convention, diplomatic premises,” including its embassy in Tehran, were “immune from court judgments.” *Id.* But, the Iranian businessman who obtained the judgment countered that the U.S. lost that international protection when it adopted the 1996 amendment to the FSIA, which allows lawsuits in U.S. courts against designated State Sponsors of Terrorism, including Iran. *Id.* An Iranian official denied that the U.S. embassy had been seized, noting that the judicial sale of embassy property is a violation of the Vienna Convention on Diplomatic Relations. ELSEA, *supra* note 32, at 66–67, 67 n. 252. This charade illustrates that these judgments are largely symbolic and reinforces the ineffective nature of international litigation to resolve disputes against sovereigns.

an Italian court in connection with the CIA's extraordinary rendition program.⁴⁰ Although none of these officials have served time for their convictions, having all fled the country before the sentences were handed down,⁴¹ these cases cause great concern for American men and women working overseas who worry their actions may not be afforded full diplomatic protection.

The threat of foreign litigation has become so pervasive that the Department of Justice has an entire division responsible for "protect[ing] U.S. interests in all litigation pending in foreign courts."⁴² According to the Office of Foreign Litigation, most of the cases it handles "are defensive" and "reflect the wide range of the U.S. Government's international activities."⁴³ Many of its cases relate to defending actions that arise from United States agency or military activity in foreign countries.⁴⁴ The Office of Foreign Litigation estimates that at any given time its lawyers are representing the United States in around 1,000 lawsuits in over 100 countries.⁴⁵ If the United States continues to invite foreign suits through additional waivers of sovereign immunity, the amount of foreign litigation to which the United States is a party can be expected to grow exponentially.

B. *In re Terrorist Attacks Litigation*

For the last decade, families of the victims of the 9/11 terrorist attacks have attempted to bring suit against the Kingdom of Saudi Arabia for its alleged involvement in those attacks. In 2005, a pair of federal district court rulings dismissed claims against the Saudi government relying on the "discretionary function" clause of the FSIA.⁴⁶ Although the FSIA provides an exception to

⁴⁰ See Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES (Nov. 4, 2009), <http://www.nytimes.com/2009/11/05/world/europe/05italy.html> [<https://perma.cc/X4FP-FD83>].

⁴¹ Ian Shapira, *Ex-CIA Officer Jailed in Portugal for Her Alleged Role in Kidnapping a Terrorism Suspect*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/ex-cia-officer-jailed-in-portugal-for-her-alleged-role-in-kidnapping-a-terrorism-suspect/2017/02/22/b3fcf94a-f906-11e6-9845-576c69081518_story.html?utm_term=.b2be4ca33422 [<https://perma.cc/PKD4-HDYG>].

Although those who were convicted have not served any time on their sentences, Sabrina de Sousa, who worked for the CIA at the time, spent ten days in a Portuguese prison after traveling to Portugal in 2015. Andrei Khalip & Jonathan Landay, *Ex-CIA Spy Freed in Portugal, Avoids Extradition over Kidnapping*, REUTERS (Mar. 1, 2017), <http://www.reuters.com/article/us-italy-us-cia-pardon-idUSKBN1683ZC> [<https://perma.cc/KXS2-UHX6>]. In addition to the stigma that these convictions have created for the men and women who were serving their country, the convictions have also prevented them from traveling abroad, fearful that they may be apprehended and extradited to Italy. See *id.*

⁴² See *Office of Foreign Litigation*, U.S. DEP'T JUST., <https://www.justice.gov/civil/office-foreign-litigation> [<https://perma.cc/DAT5-KGVX>] (last updated Aug. 1, 2017).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 801–04 (S.D.N.Y. 2005) [hereinafter *In re Terrorist Attacks I*]; *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 553–56 (S.D.N.Y. 2005) [hereinafter *In re Terrorist Attacks II*].

sovereign immunity when damage from tortious conduct occurs in the United States, the “discretionary function” clause disallows such suits when the tort results from discretionary conduct on the part of the foreign sovereign.⁴⁷ The district courts concluded that any action taken by Saudi Arabia, including any financial payments made to entities linked to terrorism, constituted discretionary functions.⁴⁸

The Second Circuit affirmed these decisions, but on different grounds.⁴⁹ The Court of Appeals held that the 1996 Amendment to the FSIA, allowing suits against state sponsors of terrorism, was the sole means for bringing a terrorism related action.⁵⁰ Because Saudi Arabia was never designated a “State Sponsor of Terrorism,” they could not be sued for terrorism-related claims under any of the other FSIA exceptions to immunity.⁵¹ The plaintiffs sought certiorari, and the United States Supreme Court called on then Solicitor General, Elena Kagan, to offer her views on the matter.⁵² It was the opinion of the Solicitor General that certiorari be denied because—although a foreign sovereign who was not designated as a State Sponsor of Terrorism could be sued for terrorism-related tortious conduct that resulted in injury in the United States—such suit could only be sustained under the FSIA when the entire tort took place “within the territorial jurisdiction of the United States.”⁵³ As the government argued, even if the allegations against Saudi Arabia are true, much of the alleged tortious conduct occurred overseas, and therefore, would not fall under the FSIA exception for tortious conduct.⁵⁴ The Supreme Court denied certiorari.⁵⁵

While this would have been the end of the *Terrorist Attacks* litigation, the Second Circuit revived the matter in *Doe v. Bin Laden* by rendering a holding inconsistent with that reached in *In re Terrorist Attacks III*.⁵⁶ In *Doe*, the Court of Appeals held that the tortious conduct and State Sponsor of Terrorism exceptions under the FSIA provided independent grounds to hold foreign sovereigns liable in

⁴⁷ Compare 28 U.S.C. § 1605(a)(5) (2012) (allowing suits against foreign sovereigns when the tortious conduct results in damage in the U.S.), with 28 U.S.C. § 1605(a)(5)(A) (containing the “discretionary function” clause, disallowing such suits where the actions constitute a “discretionary function regardless of whether the discretion be abused”).

⁴⁸ *In re Terrorist Attacks I*, 349 F. Supp. 2d at 803–04; *In re Terrorist Attacks II*, 392 F. Supp. 2d at 555–56.

⁴⁹ *In re Terrorist Attacks* on September 11, 2001, 538 F.3d 71, 83, 86–90 (2d Cir. 2008). [hereinafter *In re Terrorist Attacks III*].

⁵⁰ *Id.* at 87–89.

⁵¹ *Id.* at 89–90.

⁵² See generally Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *Fed. Ins. Co. v. Saudi Arabia* (2009) (No. 08–640).

⁵³ *Id.* at 1–3, 11–13.

⁵⁴ *Id.* at 13–14.

⁵⁵ *In re Terrorist Attacks III*, 538 F.3d 71 (2d Cir. 2008), cert. denied, 557 U.S. 935 (2009).

⁵⁶ *Doe v. Bin Laden*, 663 F.3d 64, 70–71, 70 n.10 (2d Cir. 2011) (“We recognize that this holding is inconsistent with that reached by . . . our Court in *In re Terrorist Attacks on September 11, 2011*, F.3d 71, 89 (2d Cir. 2008) . . .”).

United States courts.⁵⁷ Following this ruling, the plaintiffs in the *Terrorist Attacks* litigation filed a motion for relief from the judgment that was subsequently granted in December 2013, and the case was remanded to district court for additional proceedings.⁵⁸ Finally, in September 2015, the district court once more dismissed the litigation because, as the Solicitor General argued in her brief, the tortious conduct did not take place entirely within the territorial United States.⁵⁹

C. *The Anti-Terrorism Act*

A parallel issue in the arena of terrorism litigation arises under the Anti-Terrorism Act (ATA), which allows United States nationals to obtain treble damages against those responsible for injuries that arise out of “an act of international terrorism.”⁶⁰ Pertaining to the terrorist attacks of September 11, 2001, the ATA does not make clear if it allows for theories of secondary liability such as aiding and abetting.⁶¹ Both the Second and Seventh Circuits have held that claims based on secondary liability are excluded under the ATA.⁶²

Although most of the recent terrorism related litigation has been focused on the FSIA, some 9/11 families have made efforts to hold individuals accountable under the ATA.⁶³ These court decisions, combined with the realities of the 9/11 attacks, prevented justice from being served in the eyes of the families engaged in these litigation battles.⁶⁴ It is against this backdrop of complex and strenuous sovereign immunities litigation that Congress sought to address what many perceived was a loophole in the law.

⁵⁷ *Doe*, 663 F.3d at 70 (“[T]he terrorism exception, rather than limiting the jurisdiction conferred by the noncommercial tort exception, provides an additional basis for jurisdiction.”).

⁵⁸ *In re Terrorist Attacks on September 11, 2001*, 741 F.3d 353, 355–56, 359 (2d Cir. 2013).

⁵⁹ *In re Terrorist Attacks on September 11, 2001*, 134 F. Supp. 3d 774, 781, 788 (S.D.N.Y. 2015); see also *supra* notes 53–54 and accompanying text.

⁶⁰ 18 U.S.C. § 2333(a) (2012).

⁶¹ *Rothstein v. UBS AG*, 708 F.3d 82, 97–98 (2d Cir. 2013) (“In the ATA, § 2333 is silent as to the permissibility of aiding and abetting liability.”).

⁶² See, e.g., *id.* at 97–98; *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 93 (7th Cir. 2008).

⁶³ See *infra* notes 96–98 and accompanying text.

⁶⁴ See *infra* note 96–98 and accompanying text.

III. JUSTICE AGAINST SPONSORS OF TERRORISM ACT (JASTA)

A. *Background and Enactment*

In 2016, Congress enacted JASTA:

[T]o provide civil litigants with the broadest possible basis, . . . to seek relief against persons, entities, and foreign countries, wherever acting and wherever they may be found, that have provided material support, directly or indirectly, to foreign organizations or persons that engage in terrorist activities against the United States.⁶⁵

In enacting this legislation, Congress directed the statute at:

Persons, entities, or countries that knowingly or recklessly contribute material support or resources, directly or indirectly, to persons or organizations that pose a significant risk of committing acts of terrorism that threaten the security of nationals of the United States or the national security, foreign policy, or economy of the United States, necessarily direct their conduct at the United States, and should reasonably anticipate being brought to court in the United States to answer for such activities.⁶⁶

The passage of this bi-partisan bill was in response to the *Terrorism Attack* decisions discussed earlier in this Note and a direct result of a long and harrowing fight by the families of the victims of 9/11 to hold the government of Saudi Arabia accountable for their alleged involvement.⁶⁷ In an open letter to President Obama encouraging him to sign JASTA into law, 9/11 families wrote:

We and so many other families have fought for years to know all of the truth about 9/11. We have fought to ensure that anyone and any entity that may have had a responsible role in the murder of 3,000 people in New York, at the Pentagon and across a field in Pennsylvania is held to account for their actions.⁶⁸

However, President Obama, citing numerous national security concerns, would not sign JASTA into law.⁶⁹ Congress acted swiftly and, in a

⁶⁵ Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853 (2016).

⁶⁶ Justice Against Sponsors of Terrorism Act § 2(a)(6).

⁶⁷ See *supra* Section II.B.

⁶⁸ Strada et al., *supra* note 5.

⁶⁹ Press Release, Veto Message from the President – S.2040 to the Senate of the United States, Office of the Press Sec’y (Sept. 23, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/09/23/veto-message-president-s2040> [<https://perma.cc/LX9X-ULVN>].

bi-partisan vote, overrode the presidential veto, delivering the first and only veto override of President Obama's tenure.⁷⁰

The White House called the override "the single most embarrassing thing the United States Senate has done possibly since 1983."⁷¹ Senator Chuck Schumer (D-N.Y.), a chief sponsor of the bill, responded that "[o]verriding a presidential veto is something we don't take lightly, but it was important in this case that the families of the victims of 9/11 be allowed to pursue justice, even if that pursuit causes some diplomatic discomforts."⁷² Despite this unprecedented action, it was quickly apparent that several Senators who had voted to override President Obama's veto held serious reservations about the potential "unintended consequences" of the legislation.⁷³

From the beginning, JASTA was viewed as focusing primarily on the alleged involvement of Saudi Arabia in the terrorist attacks of September 11.⁷⁴ However, the legislation was not drafted to apply specifically to those events or actors.⁷⁵ While some supporters, like Senator John Cornyn (R-TX), believed the bill was "narrowly tailored" to deter any reciprocal legislation,⁷⁶ that opinion was not shared by many national security advisors and

⁷⁰ *Congress Rejects Obama Veto of 9/11 Bill, in First Override of Presidency*, FOX NEWS (Sept. 29, 2016), <http://www.foxnews.com/politics/2016/09/29/congress-rejects-obama-veto-911-bill-in-first-override-presidency.html> [<https://perma.cc/2SJW-Z2CD>].

⁷¹ Kim, *supra* note 2. The White House's statement was in response to reports that the veto override vote for JASTA (97–1 in the Senate) was the most overwhelming since Congress voted to override President Ronald Reagan in 1983 with a vote of 95–0. Jordan Fabian, *White House Lashes Out at 'Embarrassing' Senate Veto Override*, HILL (Sept. 28, 2016, 1:45 PM), <http://origin-ny1.thehill.com/homenews/administration/298290-white-house-lashes-out-at-embarrassing-senate-veto> [<https://perma.cc/HVN8-ND26>]. The vote in 1983 overrode President Reagan's veto of a bill that gave a few acres of land to six retired couples who learned a surveying error resulted in them paying for land that was technically still government property. Dale Russakoff, *Elderly Oregonians Win Battle on Hill*, WASH. POST (Oct. 26, 1983), https://www.washingtonpost.com/archive/politics/1983/10/26/elderly-oregonians-win-battle-on-hill/c2ceb909-ec05-4532-886b-dba63ec407a/?utm_term=.b9e57c1bfb5d [<https://perma.cc/JD2S-YMVC>].

Dale Russakoff, *Reagan Veto Criticized as an Insensitive Act*, WASH. POST (Oct. 22, 1983), https://www.washingtonpost.com/archive/politics/1983/10/22/reagan-veto-criticized-as-an-insensitive-act/94ae51d3-724e-4e44-89ff-a3a5c5d56e44/?utm_term=.3c1fbc0b8914 [<https://perma.cc/MN4W-RLQZ>]. The 1983 bill seems hardly comparable to this monumental legislation that strips sovereign immunity protections from foreign nations.

⁷² Richard Lardner, *Congress Rebukes Obama, Overrides Veto of 9/11 Legislation*, KSL.COM (Sept. 28, 2016, 4:01 PM), <http://www.ksl.com/index.php?sid=41649553&nid=481> [<https://perma.cc/6USA-C9L2>].

⁷³ See, e.g., Letter from 28 Senators, on anticipated override of President Obama's veto of S.2040, to Senators Cornyn and Schumer (Sept. 28, 2016), https://www.corker.senate.gov/public/_cache/files/d8eee900-5ffc-4204-a4f1-8072c104d9c2/Bipartisan%20Senate%20JASTA%20Letter%20092816.pdf [<https://perma.cc/7Z46-4JQN>] (noting that "concerns have been raised regarding potential unintended consequences that may result from [JASTA] for the national security and foreign policy of the United States").

⁷⁴ See Kim, *supra* note 2.

⁷⁵ See generally Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016).

⁷⁶ See Lardner, *supra* note 72.

foreign policy experts.⁷⁷ These national security concerns formed the basis for President Obama's veto of the proposed legislation.

B. A History of JASTA and What It Actually Does

Before analyzing the arguments against JASTA and concerns about unintended consequences of JASTA, it is necessary to consider the history of JASTA legislation and discuss the actual implications of the legislation. Draft versions of JASTA had been circulating in the Senate for several years, but it was not until it became apparent that the families of the 9/11 victims would not be able to seek justice under existing law that the Congress finally acted. As this Note later demonstrates, however, the version of JASTA that was ultimately passed is a stark departure from the original bill introduced in the 114th Congress and will prove to be largely ineffective at addressing its stated goals.⁷⁸ For now, we will simply look at how the legislation evolved.

On September 16, 2015, the original JASTA bill was introduced in the Senate.⁷⁹ That bill would later pass out of the Senate Judiciary Committee as an amendment in the nature of a substitution.⁸⁰ This was the first version of JASTA debated by the full Senate, and it received a lot of attention because of its potential implications for sovereign immunity and United States foreign relations.⁸¹ There were four main parts to this bill that would have amended the FSIA and the ATA. First, this bill would have reversed the recent judicial decision which held that the FSIA tort exception only applied to tortious conduct occurring entirely within the territorial United States.⁸² Second, it would have introduced clarifying language in

⁷⁷ See, e.g., Letter from Ash Carter, Sec'y, Dep't of Def., to William Thornberry, Chairman, Comm. on Armed Servs., U.S. House of Representatives (Sept. 26, 2016), <http://static.politico.com/07/ab/a362dde34184add8a98ea6bd7ce7/carter-9-11-bill-letter.pdf> [<https://perma.cc/84Y3-D23R>] ("While we are sympathetic to the intent of JASTA, its potential second- and third-order consequences could be devastating to the Department and its Service members and could undermine our important counterterrorism efforts abroad."); see also Open Letter from William Cohen, former Sec'y, Dep't of Def., et al., to the President of the United States and Members of Congress (undated), https://www.mei.edu/sites/default/files/letter_obama_congress_jasta.pdf [<https://perma.cc/XPW4-P3K2>].

⁷⁸ See *infra* Part IV.

⁷⁹ 161 CONG. REC. S6699 (daily ed. Sept. 16, 2015) (Introduction of Bills and Joint Resolutions).

⁸⁰ 162 CONG. REC. S575 (daily ed. Feb. 3, 2016) (Reports of Committees); see also Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (as reported by S. Comm. on the Judiciary, Feb. 3, 2016).

⁸¹ See, e.g., Mark Mazzetti, *Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill*, N.Y. TIMES (Apr. 15, 2016), <https://www.nytimes.com/2016/04/16/world/middleeast/saudi-arabia-warns-of-economic-fallout-if-congress-passes-9-11-bill.html?mcubz=1> [<https://perma.cc/ZPS4-4BYF>].

⁸² Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. § 3 (as reported by S. Comm. on the Judiciary, Feb. 3, 2016) (amending the FSIA tort exception in 28 U.S.C. § 1605(a) to apply "regardless of where the underlying tortious act or omission occurs"); see also *supra* Section II.B.

the ATA to make it applicable in secondary liability cases which arise out of acts of international terrorism.⁸³ Third, the bill would have allowed personal jurisdiction “to the maximum extent permissible under the 5th Amendment to the Constitution of the United States” for acts of international terrorism which create a cause of action under the ATA.⁸⁴ And finally, it would have removed the prohibition under the ATA for bringing suits against foreign states and their officers and employees acting within their official capacity.⁸⁵

The version of JASTA which passed out of committee was hotly contested and received a torrent of criticism for its sweeping abolitions of sovereign immunity principles.⁸⁶ But, when the Senate took up the bill for a floor vote, it was not the original version that would be voted on, but another amendment in the form of a substitution offered by Senator John Cornyn, one of the bill’s chief sponsors.⁸⁷ This bill, which was the version that would eventually be voted into law, included a number of changes that essentially destroyed the brunt of the force behind JASTA. Because these changes are explicated in further detail later in the Note, only a quick summary of the changes are provided in this section. Although the final version of JASTA allowed terrorism litigation against states that were not sponsors of terrorism, it limited the ability to bring such suits in other ways and created a provision allowing the United States government to stay any case brought under JASTA in perpetuity.⁸⁸ Essentially, the version of JASTA that was signed into law symbolized an erosion of sovereign immunity with all of the foreign policy and national security concerns that come with such an act; but, it lacked any teeth that would allow it to accomplish its stated purpose.⁸⁹

C. Arguments in Support of and Against JASTA and Concerns of Unintended Consequences

“I am going to support the veto override, but it is not without concern for the potential unintended consequences. . . . [T]he risk of shielding the perpetrators of terrorism from justice outweighs the risks on how other countries might respond to

⁸³ S. 2040 § 4 (amending 18 U.S.C. § 2333 to allow aiding and abetting liability in actions for injury that arise from “an act of international terrorism committed, planned, or authorized by an organization that has been designated as a foreign terrorist organization”); *see also supra* Section II.C.

⁸⁴ S. 2040 § 5. Effectively, this section was designed to overrule recent circuit court decisions which had held that families of 9/11 victims lacked personal jurisdiction over certain Saudi defendants. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 679–82 (2d Cir. 2013).

⁸⁵ S. 2040 § 6; *see also* 18 U.S.C. § 2337 (2012).

⁸⁶ *See, e.g., Mazetti, supra* note 81.

⁸⁷ 114 CONG. REC. S2846–48 (daily ed. May 17, 2016).

⁸⁸ *Compare* Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. (as reported by S. Comm. on the Judiciary, Feb. 3, 2016), *with* Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, 130 Stat. 852 (2016).

⁸⁹ *See infra* Part IV.

and perhaps compromise U.S. interests.”⁹⁰ Even before the veto override votes had been counted, members of Congress from both parties were speaking out about the “unintended consequences” of the legislation they were about to pass.⁹¹ This section examines various arguments against the passage of JASTA and the counter-arguments in favor.

i. JASTA Places Strategic Foreign Policy Decisions in the Hands of the Courts Rather Than National Security Experts

As President Obama argued in his veto message to Congress, JASTA removes responsibility for handling terrorist activities from the hands of foreign policy and national security professionals and places it in the hands of private litigants and the courts.⁹² Foreign policy considerations, including the United States response to terrorism, are largely the responsibility of the executive branch with input from Congress. These decisions usually require quick and decisive action of the kind the President is more adept at performing. It is for this reason that the State Department, intelligence agencies, and the National Security Council are all organized under the executive, with legislators providing key oversight.⁹³ The President, with input from his national security team, already has the power to label a foreign government a State Sponsor of Terrorism; such a designation brings with it a litany of effective United States responses, including a partial stripping of sovereign immunity.⁹⁴

In contrast to the careful and thoughtful decision—with input from a myriad of national security, foreign policy, and intelligence professionals—to designate a foreign government as a State Sponsor of Terrorism, JASTA allows any foreign sovereign to be stripped of its sovereign immunity based solely on the accusations of a litigant in a United States court.⁹⁵ This can invite consequential decisions on incomplete or inaccurate information, which may in fact run counter to United States foreign policy objectives.

Consider, for example, a recent case that involved private litigants attempting to collect a judgment against the Palestinian National Authority (“PNA”) in a United States court. The litigants had obtained a judgment against the PNA and the

⁹⁰ 162 CONG. REC. S6169 (daily ed. Sept. 28, 2016) (statement by Sen. Cardin on voting to override President Obama’s veto).

⁹¹ See *supra* note 73 and accompanying text.

⁹² Press Release, Veto Message from the President – S.2040, *supra* note 69.

⁹³ As argued by former U.N. Ambassador, John Bolton, and former U.S. Attorney General, General Michael Mukasey, “[ASTA] shifts authority for a huge component of national security from the politically accountable branches—the president and Congress—to the judiciary, the branch least competent to deal with international matters of life and death and least politically accountable.” John R. Bolton & Michael B. Mukasey, *The Folly of Fighting Terrorism by Lawsuit*, WALL ST. J. (Sept. 5, 2016, 6:54 PM), www.wsj.com/articles/the-folly-of-fighting-terrorism-by-lawsuit-1473116091 [<https://perma.cc/UCK6-XR6D>].

⁹⁴ Press Release, Veto Message from the President – S.2040, *supra* note 69.

⁹⁵ See *id.*

Palestinian Liberation Organization (PLO) under the ATA, which—because of the treble damages clause in that statute—totaled \$655.5 million.⁹⁶ The problem, the United States government provides hundreds of millions of dollars a year to support the PNA, largely as an effort to promote stability in the region and deter other terrorist groups.⁹⁷ When the litigants moved to satisfy their judgment by requiring the PNA to post a bond, the United States government filed a declaration with the court to persuade them to waive or reduce the bond.⁹⁸

In response to concerns over JASTA's effect on the executive branch's ability to alleviate national security issues, the supporters of JASTA argued that President Obama's veto constituted a shift in his administration's previous views on allowing victims of terrorist attacks to seek justice in United States courts.⁹⁹ In support of this proposition they point to the same declaration submitted in the PNA case discussed above. Rather than looking to the underlying case and the foreign policy implications that have arisen from the litigation, they observe that the Deputy Secretary of State insists that "[i]mposing civil liability on those who commit or sponsor acts of terrorism is an important means of deterring and defeating terrorist activity."¹⁰⁰ Regardless of the utopian ideals for countering terrorism that Deputy Secretary Blinken discusses, the PNA case and the declaration itself actually present the unintended consequences that can arise from such private litigation.

⁹⁶ Jennifer Peltz & Tom Hays, *U.S. Jury: Palestinian Authorities to Blame for Terror Attacks*, MIAMI HERALD (Feb. 23, 2015, 1:31 PM), <http://www.miamiherald.com/news/nation-world/world/article11014829.html> [https://perma.cc/LGM6-9LEP].

⁹⁷ See generally JIM ZANOTTI, CONG. RESEARCH SERV., RS22967, U.S. FOREIGN AID TO THE PALESTINIANS (2016) (discussing U.S. assistance to Palestinians).

⁹⁸ *U.S. Government Intervenes in Lawsuit Payments over Palestinian Terror Attacks*, GUARDIAN (Aug. 11, 2015, 6:08 PM), <https://www.theguardian.com/us-news/2015/aug/11/palestine-obama-administration-terror-attack-lawsuit-payments> [https://perma.cc/43FX-F8XT]. Deputy Secretary of State Blinken makes the case that the U.S. "strongly supports the rights of victims of terrorism to vindicate their interests in federal court and to receive just compensation for their injuries." Brief for Respondent at Appendix 4a–5a, Declaration of Anthony J. Blinken, *Sokolow v. Palestine Liberation Org.*, Civil Action No. 1:04-cv-00397-GBD-RLE (May 23, 2017) (No.16–1071). Supporters of JASTA point to this as an indication that the U.S. believes civil liability is an effective tool to be used in deterring and defeating terrorism around the globe, but the underlying case proves this mechanism can often run counter to U.S. foreign policy objectives. See *id.* at 4a–6a. In an ironic twist, one of the first cases brought under the newly passed JASTA was not against the Kingdom of Saudi Arabia, but rather against Israel, one of America's strongest Middle Eastern allies. Joshua Claybourn, *How Congress Made it Easier to Sue Israel*, HILL (Feb. 6, 2017, 2:12 PM), <http://origin-ny1.thehill.com/blogs/pundits-blog/international-affairs/318097-how-congress-made-it-easier-to-sue-israel> [https://perma.cc/9MUM-65NW]. This illustrates the reality that JASTA will lead to results antithetical to U.S. foreign policy objectives.

⁹⁹ *Response to the Message of the President Accompanying His Veto of the Justice Against Sponsors of Terrorism Act*, PASSJASTA.ORG (Sept. 26, 2016), <http://passjasta.org/2016/09/response-message-president-accompanying-veto-justice-sponsors-terrorism-act/> [https://perma.cc/56HB-BZ4L].

¹⁰⁰ See Brief for Respondent, *supra* note 98, at 6a.

ii. The Erosion of Sovereign Immunity Leaves the United States Vulnerable to Reciprocal Treatment by Other Countries

Sovereign immunity has served as a bedrock principle of international relations for hundreds of years.¹⁰¹ As President Obama argued in his veto message, JASTA disrupts this foundational principle and, if applied globally, will have disastrous implications for United States national interests.¹⁰² Reciprocity is a key tenant of foreign relations; indeed, other countries already have laws in place that allow tit-for-tat erosions of sovereign immunity, and such laws are in conformity with international practices.¹⁰³ Past experiences have shown, when Congress passes legislation that makes it easier for private litigants to sue foreign sovereigns in United States courts, no matter how targeted or narrow the legislation is, we can expect to face reciprocal treatment from other countries.¹⁰⁴

In response to this concern, supporters of JASTA noted that the final version of the bill that passed through Congress was the result of careful consideration, and amendments were designed specifically to ameliorate any concerns of reciprocity.¹⁰⁵ Specifically, amendments were made to allow the United States government to stay a lawsuit “if the State Department verifie[d] the administration [was] engaged in good faith discussions” to resolve the dispute.¹⁰⁶ Additionally, the law was amended to require a defendant to establish that the foreign government acted with more than mere negligence; that it acted recklessly or intentionally.¹⁰⁷ Supporters argued

¹⁰¹ GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 9–19 (1984). There has been some discussion as to whether sovereign immunity is enshrined in international law and therefore whether JASTA is in violation of such laws. See, e.g., William Dodge, *Does JASTA Violate International Law?*, JUST SECURITY (Sept. 30, 2016, 4:19 PM), <https://www.justsecurity.org/33325/jasta-violate-international-law-2/> [https://perma.cc/8NHW-SDRS]. This Note does not seek to address whether JASTA violates international law, but rather asserts that it cuts against traditional principles of international relations. It is certainly far from clear if international law is breached through this act, but, arguably, it is abundantly clear that, at the very least, JASTA violates international comity, which often forms the basis for reciprocal action. See *id.*

¹⁰² Press Release, Veto Message from the President – S.2040, *supra* note 69 (“The United States has a larger international presence, by far, than any other country, and sovereign immunity principles protect our Nation and its Armed Forces, officials, and assistance professionals, from foreign court proceedings.”).

¹⁰³ For example, Russia and Iran both have reciprocity laws designed to “deter the lifting of [their] sovereign immunity” by other countries, and Cuba and Iran have laws specifically targeting U.S. sovereign immunity. Peter Roudik, Glob. Legal Research Ctr., Law Library of Cong., *Comparative Summary*, in LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES 1 (2016), <https://www.loc.gov/law/help/sovereign-immunity/lifting-sovereign-immunity.pdf> [https://perma.cc/6UHS-APK2].

¹⁰⁴ See *supra* notes 32–45 and accompanying text.

¹⁰⁵ See *Response to the Message of the President Accompanying His Veto of the Justice Against Sponsors of Terrorism Act*, *supra* note 99.

¹⁰⁶ Jordain Carney, *GOP Leaders Express Reservations a Day After 9/11 Veto Override*, HILL (Sept. 29, 2016, 2:29 PM), <http://thehill.com/policy/national-security/298530-gop-leaders-open-to-fixing-saudi-9-11-bill> [https://perma.cc/ZX7X-3Z7V]; see also Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 5(c), 130 Stat. 852, 854 (2016).

¹⁰⁷ Carney, *supra* note 106; see also Justice Against Sponsors of Terrorism Act § 3(d).

that the passage of JASTA by wide vote margins and with bipartisan support, after these amendments, demonstrated Congress's view that the revisions had addressed any legitimate concerns and that JASTA was good policy.¹⁰⁸

The 9/11 Committee, a group of 9/11 families and JASTA supporters, expressed the view that JASTA was narrowly tailored and applied only to acts of international terrorism caused by "a foreign state."¹⁰⁹ This caveat, the group concluded, makes the law inapplicable to military activities and actions by individual foreign agents.¹¹⁰ Because of the law's narrow application, the Committee argues that there is no legitimate threat of reciprocal statutes being enacted against the United States.¹¹¹ Instead, the group believes President Obama's real concern is not grounded in the international law concept of reciprocity, but rather the fear that other nations will engage in "acts of provocation and aggression" toward the United States government's legitimate overseas actions.¹¹² The Committee argues the proper way to address such concerns is not through a veto of JASTA, but rather by making clear to foreign nations that the United States will respond to acts of aggression using its "full range of diplomatic, economic, social, and military" tools.¹¹³

While supporters of JASTA may be correct to assume that much of the international response to JASTA will be grounded in provocation rather than true reciprocity, this legislation at least gives foreign states the opportunity to claim reciprocity in an international forum. American financial and material support can be traced to behavior across the globe that may be deemed terroristic activity by other countries—for example, Middle Eastern countries may view United States aid to Israel as terroristic when it results in displacements or killings in the West Bank; other countries may seek to hold the U.S. accountable for the alleged civilian attacks perpetrated by United States-backed Syrian rebels; and American airstrikes that cause civilian deaths, even those targeted at Al Qaeda and the Islamic State, may be viewed as a form of terrorism.¹¹⁴ The threat of true reciprocal action may be remote, but that will not stop our adversaries from seizing on this legislation as an opportunity to respond in kind. The breadth of United States involvement around

¹⁰⁸ See *Response to the Message of the President Accompanying His Veto of the Justice Against Sponsors of Terrorism Act*, *supra* note 99.

¹⁰⁹ *Response to the Message of the President Accompanying His Veto of the Justice Against Sponsors of Terrorism Act*, *supra* note 99; see also *Message from 9/11 Committee*, *supra* note 4.

¹¹⁰ See *Response to the Message of the President Accompanying His Veto of the Justice Against Sponsors of Terrorism Act*, *supra* note 99.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ For example, it was reported that Syria sought to take legal action against the United States in connection with the death of Syrian nationals in Lebanon who Syria claimed died as a result of bombings carried out by the Israeli Air Force with U.S.-supplied weaponry. See George Sadek, Glob. Legal Research Ctr., Law Library of Cong., *Syria*, in LAWS LIFTING SOVEREIGN IMMUNITY IN SELECTED COUNTRIES 16 (2016), <https://www.loc.gov/law/help/sovereign-immunity/lifting-sovereign-immunity.pdf> [<https://perma.cc/6UHS-APK2>]; see also Claybourn, *supra* note 98.

the world leaves us particularly vulnerable to such attacks and means that we have the most to lose from even the slightest threat of reciprocity, no matter what the true motivations may be.

iii. Foreign Litigation Would Involve an Intrusive Discovery Process and the Risk of Extreme Monetary Damages

Defense Secretary Ash Carter expressed concerns about the “intrusive discovery process” that would result from mere accusations by foreign actors that the United States provided support for terrorist activities.¹¹⁵ Coupled with this concern, Secretary Carter outlined the potential that litigants may request sensitive government information during the discovery process.¹¹⁶ Exposure to foreign litigation may place the United States in the ill-fated position of choosing whether to protect classified information or suffer an adverse ruling in a foreign court.¹¹⁷ An adverse ruling would also create a sizeable risk of extreme money damages being assessed against the United States and numerous overseas assets potentially being at risk of seizure to satisfy any judgment.¹¹⁸ Having to defend and strategize against foreign litigation would divert valuable resources from crucial foreign policy and national security initiatives.

iv. JASTA Will Complicate Delicate Relationships with Key Allies

One argument, which may be of little concern to the families who lost their loved ones on September 11, 2001, is that JASTA will interfere in our relationships with foreign partners. President Obama claimed that JASTA will further complicate relationships with key allies and undermine trust and cooperation between the United States and valuable overseas partners who work with the United States on counterterrorism and national security issues across the globe.¹¹⁹ This concern was also shared by Secretary Carter and a coalition of former national security and foreign policy professionals.¹²⁰

While this concern may be easily dismissed by families seeking justice for their loved ones, the reality is that the United States relies heavily on global allies and the support of Middle Eastern nations to protect against violent extremism and acts of terrorism directed against the United States and our allies. While JASTA was being debated in the Senate, the United Arab Emirates (UAE) was privately warning United States lawmakers that “JASTA would also have a chilling effect on

¹¹⁵ See Letter from Ash Carter to William Thornberry, *supra* note 77.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Press Release, Veto Message from the President – S.2040, *supra* note 69.

¹²⁰ See Letter from Ash Carter to William Thornberry, *supra* note 77.

the global fight against terrorism.”¹²¹ The UAE, and other allies, warned that they may be forced to curtail the breadth of their intelligence sharing with the United States if the law were to pass:¹²² “If a foreign sovereign nation is at risk of being sued in a US court, even if it’s an ally, that nation will be less likely to share crucial information and intelligence under [JASTA].”¹²³

The United States must be able to maintain delicate and complex relationships with its Middle East allies in order to continue to fight against future acts of terrorism. Even if this concern rings hollow to the 9/11 families, it is a real and legitimate concern for future United States counterterrorism strategies.

IV. THIS VERSION OF JASTA WILL FAIL TO SOLVE THE PROBLEMS IT SEEKS TO ADDRESS

Reasonable people can disagree about whether a terrorism exception to sovereign immunity is the best way to seek justice for the 9/11 families; what is clear though, is that the JASTA bill enacted into law, carries substantial costs and provides virtually no benefits to 9/11 victims and their families. The original JASTA bill that passed out of the Senate Judiciary Committee would have waived immunity for foreign sovereigns and allowed suit when the tortious acts took place overseas and against those who merely aided and abetted acts of terrorism.¹²⁴ By contrast, the version of JASTA that passed through Congress provides significant and likely insurmountable hurdles for the families seeking justice, but it still represents a symbolic waiver of sovereign immunity that will likely be met with reciprocal action overseas.

The version of JASTA first passed out of Committee was specifically tailored to override previous court decisions that had created impediments to the 9/11 families seeking to bring lawsuits against the Saudis. First, it provided an express grant of personal jurisdiction in terrorism cases; by contrast, the final version of JASTA provides no such grant.¹²⁵ Second, the original JASTA would have amended the FSIA exception for tortious conduct to allow suit where the conduct occurred outside of the territorial United States.¹²⁶ The final version of JASTA did not include this amendment.¹²⁷

The first version of JASTA also contained a provision that removed the general prohibition on suing foreign sovereigns under the ATA.¹²⁸ Under the final JASTA

¹²¹ Edward Malnick & Luke Heighton, *UAE Warned US It Could End Intelligence Cooperation over 9/11 Victims Claims*, TELEGRAPH (June 21, 2017, 10:00 PM), <http://www.telegraph.co.uk/news/2017/06/21/uae-warned-us-could-end-intelligence-cooperation-911-victims/> [https://perma.cc/6YWL-C2J6].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *supra* Section III.B.

¹²⁵ See *supra* note 84 and accompanying text.

¹²⁶ See *supra* note 82 and accompanying text.

¹²⁷ See *supra* note 88 and accompanying text.

¹²⁸ See *supra* note 85 and accompanying text.

law, this amendment was drastically narrowed. As enacted, JASTA, like the ATA, prohibits claims against “a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity.”¹²⁹ In fact, the law appears to purposefully exclude foreign sovereigns from liability under an aiding and abetting theory.¹³⁰ That said, JASTA does allow suit against foreign sovereigns in limited circumstances. JASTA suits are permissible:

[I]n any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—(1) an act of international terrorism in the United States; and (2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.¹³¹

As discussed above, however, claims against foreign sovereigns cannot be based on an aiding and abetting theory of liability.¹³² Thus, JASTA suits may still only be based on primary liability, which has already been a significant barrier to 9/11 litigation.

One of the most significant differences between previous versions of JASTA and the bill that was finally passed comes from Section Five. This new section creates a procedure under which the United States government can stay any case under JASTA, potentially indefinitely, if the United States government certifies that it is “engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims.”¹³³ The district court appears to have discretion on whether to grant the initial stay, but after the first stay is granted, the law requires the court to extend the stay as long as the government continues to

¹²⁹ 18 U.S.C. § 2337(2) (2012).

¹³⁰ See Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 4(a), 130 Stat. 852, 854 (2016). The Act provides that aiding and abetting liability may be asserted against any person. *Id.* It further provides “the term ‘person’ has the meaning given the term in section 1 of title 1.” *Id.* In that section, person is defined to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. § 1 (2012). This definition appears to exclude foreign sovereigns; thus, a plain reading of the amended statute under JASTA would offer no aiding and abetting liability against foreign sovereigns. Because no one is claiming the Kingdom of Saudi Arabia actually perpetrated the 9/11 attacks, any theory of liability would be based on a secondary liability such as aiding and abetting.

¹³¹ Justice Against Sponsors of Terrorism Act § 3.

¹³² See *supra* note 88, 130 and accompanying text.

¹³³ Justice Against Sponsors of Terrorism Act § 5. This new section gives the U.S. Attorney General the ability to intervene in any case brought under JASTA. *Id.* Once they have intervened, the U.S. government may petition the court to stay any proceeding “if the Secretary of State certifies that the United States is engaged in good faith discussions with the foreign state defendant concerning the resolution of the claims against the foreign state.” *Id.* Once a court decides to stay a proceeding under any such certification, they *must* extend the stay as long as the U.S. “remains engaged in good faith discussions with the foreign state defendant.” *Id.*

certify it is in good faith discussions with the foreign state defendant.¹³⁴ Of course, the district court may deny the initial stay, but past precedent shows federal judges' willingness to find ways to avoid reaching the merits of these suits, and it seems unlikely that a court would be willing to allow a suit to proceed when the law gives them the ability to stop it.¹³⁵ This stay provision alone will likely end future attempts to sue foreign sovereigns for terrorism activity, before such suits can even get off the ground.

In addition to the provisions discussed above, the new JASTA also makes it harder to prosecute any case if that case could have been brought in an independent manner. A new amendment to the FSIA under JASTA requires a judge to "stay any request, demand, or order for discovery on the United States" when the Attorney General certifies that it would "significantly interfere with . . . a national security operation."¹³⁶ While this only allows the judge to stay discovery requests on the United States, any claim would not be able to advance as long as this stay remains in place. Just as the stay created under Section Five of JASTA, this stay may potentially be imposed indefinitely, creating yet another barrier to meaningful terrorism litigation under JASTA.

Finally, if a private plaintiff somehow managed to obtain a judgment under JASTA — surmounting all the legal hurdles placed in the plaintiff's way — the plaintiff would face even more obstacles when he or she sought to enforce the judgment. The original JASTA bill was written to modify existing FSIA exceptions, but the final JASTA created a separate FSIA exception.¹³⁷ Why does this matter? The FSIA has a separate provision concerning whether a foreign state's property is immune from attachment following a judgment.¹³⁸ That is to say, even if a claim is permitted under the FSIA, the property also must be excluded from attachment immunity under the FSIA in order to use it to satisfy a judgment. The existing exceptions in the FSIA, to which the original JASTA applied, are exempt from attachment immunity.¹³⁹ Thus, if a judgment was obtained under one of those exceptions, the foreign state's property would be subject to attachment.¹⁴⁰

¹³⁴ *Id.*

¹³⁵ See *supra* Section II.B.

¹³⁶ 28 U.S.C. § 1605(g)(1) (2012 & Supp. III 2016); see also Justice Against Sponsors of Terrorism Act § 3(b)(2) (amending 28 U.S.C. § 1605(g)(1) to apply to the new JASTA claims that may be brought under 28 U.S.C. § 1605B).

¹³⁷ The Senate Judiciary Committee's version of JASTA modified existing exceptions under the FSIA. By contrast, the JASTA bill that passed through Congress created a new exception under 28 U.S.C. § 1605B. See *supra* note 88 and accompanying text.

¹³⁸ See 28 U.S.C. § 1610 (2012).

¹³⁹ See 28 U.S.C. § 1605; 28 U.S.C. § 1610.

¹⁴⁰ Even with this exemption provision, it has been notoriously difficult to collect judgments against foreign states. But, one potential unintended benefit of the recent Iran nuclear deal is that it may make it easier to collect on previous judgments rendered against Iran under provisions of the ATA and FSIA (Iran is a designated state sponsor of terrorism, thus the FSIA exception that has been in place since 1996 allows for suits against Iran). Charlie Savage, *Iran Nuclear Deal Could Be Gateway for Terrorism Legal Claims*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/terrorism-foreign-governments-lawsuits-iran-nuclear-deal.html?mcubz=1> [https://perma.cc/6FX5-CDBB].

Conversely, there is no corresponding attachment immunity exclusion in the new JASTA;¹⁴¹ therefore, any judgment obtained under the new JASTA section of the FSIA would not exempt the foreign state's property from attachment. Whether this was simply a congressional oversight or an intended obstruction is not clear. Either way, it provides another significant barrier to terrorism litigation.

To reiterate, while it was entirely reasonable for people to disagree over whether the benefits of the original JASTA outweighed its likely costs, the final version of JASTA leaves no room for reasonable disagreement. By passing a bill that symbolically strips sovereign immunity from any nation that may be accused of international terrorism, and at the same time creates significant and overwhelming obstacles to potential litigation, Congress has left the 9/11 families with no practical means for seeking justice and put our country at risk for reciprocal treatment from other nations. JASTA is “thus the worst of all worlds.”¹⁴²

V. NAVIGATING SOVEREIGN IMMUNITY IN A POST-JASTA WORLD

A. *Opportunities to Amend JASTA and Mitigate any Unintended Consequences*

Only two days after Congress voted to override President Obama's veto and to enact JASTA into law, Stephanie DeSimone, whose husband was killed at the Pentagon on September 11, was the first to file suit.¹⁴³ The Saudi government responded, noting that “JASTA is of great concern to the community of nations that object to the erosion of the principle of sovereign immunity, which has governed international relations for hundreds of years. The erosion of sovereign immunity will have a negative impact on all nations, *including the United*

Following the Iran nuclear deal, a group of terrorism victims who successfully won a judgment against Iran have gone to a European court to try to enforce it; the court has put a freeze on \$1.6 billion in Iranian assets pending the outcome of the hearing. *Id.* While some have argued that this type of action “violate[s] the spirit” of the nuclear deal, it perfectly illustrates the difficulty terrorism victims have encountered in trying to collect their judgments, even when they were given an exception to attachment immunity. *Id.*

¹⁴¹ See Justice Against Sponsors of Terrorism Act § 3; 28 U.S.C. § 1610.

¹⁴² Jack Goldsmith & Stephen I. Vladeck, *Why Obama Should Veto 9/11 Families Bill*, CNN (Sept. 13, 2016, 4:45 PM), <http://www.cnn.com/2016/09/13/opinions/obama-9-11-families-bill-goldsmith-vladeck/index.html> [<https://perma.cc/64KU-YKBN>].

¹⁴³ Greg Clary, *9/11 Widow Files Lawsuit Against Saudi Arabia*, CNN (Oct. 1, 2016, 7:36 PM), <http://www.cnn.com/2016/10/01/politics/saudi-arabia-9-11-lawsuit> [<https://perma.cc/7HTY-ZS8H>]. More than 800 people, including those injured on 9/11 and the families of those killed, have also filed a lawsuit against Saudi Arabia after the passage of JASTA. Claudia Koerner, *Hundreds of 9/11 Victims and Their Family Members Are Suing Saudi Arabia*, BUZZFEED NEWS (Mar. 20, 2017, 5:41 PM), https://www.buzzfeed.com/claudiakoerner/911-victims-sue-saudi-arabia?utm_term=.pewQrOY1kZ#.hl06kB3vDb [<https://perma.cc/ESY2-JKTH>]. In addition, insurance companies and others are lining up to sue the Saudis for billions in damages as a result of their alleged involvement in the attacks of September 11, 2001. Jonathan Stempel, *Insurers, Victims Sue Saudi Arabia over Sept. 11 Terrorist Attacks*, INS. J. (Mar. 27, 2017), <http://www.insurancejournal.com/news/national/2017/03/27/445679.htm> [<https://perma.cc/K77M-TSA8>].

States.¹⁴⁴ But, Saudi Arabia is not alone in its condemnation of the new law. The European Union Delegation to the United States has filed a formal complaint with the State Department regarding JASTA.¹⁴⁵ In it, they argue that the “implementation of the JASTA would be in conflict with fundamental principles of international law and in particular the principle of State sovereign immunity.”¹⁴⁶ Thus, even before JASTA has been fully implemented, threats of negative consequences are being expressed by other countries.¹⁴⁷ Congress has a duty to act now, before other nations enact reciprocal laws.

Some have argued that fixing JASTA may be as simple as passing an amendment that grants the President authority to waive the new terrorism exception to the FSIA with respect to certain countries.¹⁴⁸ After all, there is precedent for such a move. In 2008, during the Bush Administration, Congress passed legislation that amended the FSIA but allowed the President to waive the exception that would have granted plaintiffs the ability to sue Iraq for terrorist acts committed under the Saddam Hussein regime.¹⁴⁹ Similarly, in 1996 Congress passed legislation that would allow individuals to sue Cuba for trafficking in seized property, but included a waiver provision that has been used by every president since its enactment.¹⁵⁰ But, given President Trump’s previous comment calling President Obama’s veto of JASTA a “disgrace,”¹⁵¹ it seems unlikely that he would sign such an amendment or authorize such a waiver even if available.

Additionally, Congress could pass an amendment that narrows the application of JASTA to only apply to the attacks of September 11. This option would provide the families of 9/11 victims the opportunity to file suit while also minimizing any attempts at reciprocity. It can be argued that the attacks of September 11 are

¹⁴⁴ Clary, *supra* note 143 (emphasis added).

¹⁴⁵ Letter from the EU Delegation to the U.S. Dep’t of State (Sept. 19, 2016), <https://www.washingtonpost.com/news/powerpost/wp-content/uploads/sites/47/2016/09/EU-on-JASTA.pdf> [https://perma.cc/F6TT-ZJWA] (referring to the adoption of the Justice Against Sponsors of Terrorism Act).

¹⁴⁶ *Id.* The EU Delegation goes on to argue, “State immunity is a central pillar of international legal order. Any derogation from the principle of immunity bears the inherent danger of causing reciprocal action by other states and an erosion of the principle as such. The latter would put a burden on bilateral relations between states as well as on the international order as a whole.” *Id.*

¹⁴⁷ *Saudi Arabia Condemns Passage of US 9/11 Law*, ALJAZEERA (Sept. 30, 2016), <http://www.aljazeera.com/news/2016/09/saudi-arabia-condemns-passage-911-law-160930042131171.html> [https://perma.cc/4L7F-FP85].

¹⁴⁸ John Bellinger, *How Congress Could Fix JASTA: Give the President Waiver Authority*, LAWFARE (Oct. 5, 2016, 8:40 PM), <https://www.lawfareblog.com/how-congress-could-fix-jasta-give-president-waiver-authority> [https://perma.cc/JP97-EMUC].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also Mimi Whitefield, *Trump to Suspend Lawsuit Provision of Helms-Burton Act in August*, MIAMI HERALD (July 17, 2017, 4:24 PM), <http://www.miamiherald.com/news/nation-world/world/americas/cuba/article161810183.html> [https://perma.cc/H3R9-X9DD] (noting President Trump’s decision to use the waiver provision).

¹⁵¹ Mark Hensch, *Trump Slams Obama for ‘Shameful’ 9/11 Bill Veto*, HILL (Sept. 23, 2016, 6:18 PM), <http://thehill.com/blogs/ballot-box/presidential-races/297558-trump-rips-obama-for-shameful-9-11-veto> [https://perma.cc/E8R2-K8J9].

unique and passage of such a targeted amendment would make it difficult for foreign governments to legitimately argue for reciprocity. As currently drafted, JASTA does not have such a limited scope, but rather applies to the terrorist attacks of September 11 and any terrorist attacks that occur after.¹⁵²

Another option would be to limit JASTA's effects on sovereign immunity by applying the statute solely to Saudi Arabia. In contrast to JASTA's broad exception to sovereign immunity, which could form the basis of a reciprocal act by any country, a narrower application would limit potential adverse effects.¹⁵³ Furthermore, "[s]uch a targeted approach would be [more] consistent with what Congress" has previously done, such as when it enacted a terrorism exception to sovereign immunity that targeted state sponsors of terrorism.¹⁵⁴ Although Saudi Arabia is not currently on the state sponsors of terrorism list—and likely will not be placed on it—Congress could go around the executive branch in this limited case to statutorily allow terrorism suits against the Kingdom of Saudi Arabia.¹⁵⁵ Ultimately, this option would also require Congress to acknowledge the true target of this legislation; Congressional leaders may not want to make themselves more accountable for any negative consequences to United States–Saudi relations.¹⁵⁶

Some have argued that limiting the legislation to Saudi Arabia alone may not solve the problem.¹⁵⁷ They suggest that instead of using JASTA to "create a new terrorism exception to the FSIA," as it currently does, JASTA should amend the current FSIA tort exception to allow suit where the action occurs outside of the United States.¹⁵⁸ Those in favor of this revision note its many advantages: a tort exception to sovereign immunity is common in international relations, and, although the United States interprets its exception to require the "entire tort" to occur within the United States, this does not appear to be the prevailing international consensus.¹⁵⁹ Additionally, the tort exception has a specific exclusion for military activities during armed conflicts, which would limit reciprocal laws from applying to United States military action.¹⁶⁰

¹⁵² Justice Against Sponsors of Terrorism Act, Pub. L. No. 114–222, § 7, 130 Stat. 852, 855 (2016).

¹⁵³ See Curtis Bradley & Jack Goldsmith, *How to Limit JASTA's Adverse Impact*, LAWFARE (June 3, 2016, 10:00 AM), <https://www.lawfareblog.com/how-limit-jastas-adverse-impact> [<https://perma.cc/4XRH-5WWL>].

¹⁵⁴ See *id.*

¹⁵⁵ See *State Sponsors of Terrorism*, *supra* note 33.

¹⁵⁶ Bradley & Goldsmith, *supra* note 153.

¹⁵⁷ See, e.g., William Dodge, *JASTA and Reciprocity*, JUST SECURITY (June 9, 2016, 4:00 PM), <https://www.justsecurity.org/31445/jasta-reciprocity/> [<https://perma.cc/V5XK-UTWB>].

¹⁵⁸ *Id.* This was a part of the version of JASTA which passed out of committee but was not in the final JASTA bill passed through Congress. See Justice Against Sponsors of Terrorism Act, S. 2040, 114th Cong. § 3 (as reported by S. Comm. on the Judiciary, Feb. 3, 2016).

¹⁵⁹ Dodge, *supra* note 157.

¹⁶⁰ See *id.* The International Court of Justice has ruled that international law requires a territorial tort exception to sovereign immunity. The practical effect is to create an exemption for torts caused by a State's armed forces "in the course of conducting an armed conflict." *Id.*; see also Jurisdictional

Yet another proposed tweak is to allow JASTA suits only where a foreign sovereign “knowingly engage[d] with a terrorist organization” to carry out an act of terror.¹⁶¹ This would significantly limit the scope of JASTA and create an additional legal obstacle before suit is allowed. While some may argue this amendment would only further weaken the effectiveness of JASTA while maintaining its risk for international reciprocity, the limitation would assuage some fear among the United States’ allies that they may become targets of a JASTA suit. Indeed, there is even some evidence that this change would go a long way in curbing the anxiety many key Middle Eastern allies felt after the passage of JASTA.¹⁶²

The author does not profess to have created an exhaustive list of potential solutions for JASTA legislation, but there is clearly no shortage of options or ideas. Congress must act swiftly to resolve concerns of other nations—particularly the concern of United States allies and partners in fighting terrorism overseas. The JASTA legislation as enacted is wholly inadequate and must be limited to curb any potential for unintended consequences. However, even if changes are made to this particular legislation to limit any negative effects, Congress must do more to prevent the assault on principles of sovereign immunity.

B. Congress Has a Duty to Stop the Erosion of Sovereign Immunity When It Does Not Benefit United States National Security Interests

Fixing the problems with JASTA will not be enough. The principles of sovereign immunity must continue to exist to protect the interests of the United States as it conducts extensive global operations. Only a few days after the passage of JASTA, Senator Chuck Grassley (R-IA) introduced another piece of legislation aimed at eroding the doctrine of sovereign immunity.¹⁶³ Senator Grassley’s new bill, which would remove immunity for foreign state-owned companies,¹⁶⁴ must be given careful scrutiny by Congress that was lacking in its initial assessments of JASTA. “Congress should be very cautious about amending legislation, especially the Foreign Sovereign Immunities Act, to help plaintiffs’ lawyers when they have lost in court.”¹⁶⁵

Immunities of State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 78 (Feb. 3), <http://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf> [https://perma.cc/98X4-6QHT].

¹⁶¹ Cameron Joseph, *Polis Push ‘Fix’ to Law Allowing 9/11 Families to Sue Saudi Arabia*, N.Y. DAILY NEWS (Nov. 30, 2016, 7:39 PM), <http://www.nydailynews.com/news/politics/polis-push-fix-law-allowing-9-11-families-sue-saudi-arabia-article-1.2893546> [https://perma.cc/F36S-NY49].

¹⁶² See Malnick & Heighton, *supra* note 121.

¹⁶³ John Bellinger, *More Threats to Sovereign Immunity? New Bill Would Strip State-Owned Companies of Immunity*, LAWFARE (Sept. 23, 2016, 11:12 AM), <https://www.lawfareblog.com/more-threats-sovereign-immunity-new-bill-would-strip-state-owned-companies-immunity> [https://perma.cc/M4BM-EQQE].

¹⁶⁴ *Id.*

¹⁶⁵ Patrick Gregory, *Grassley Considers FSIA Fix, Cites China National Drywall Suit*, 84 U.S.L.W. 48 (June 23, 2016).

The United States has even more incentive for upholding principles of sovereign immunity when looking at recent actions by the International Criminal Court (ICC), which, for the first time, appears ready to open an investigation into alleged crimes committed by United States personnel abroad.¹⁶⁶ Specifically, the ICC is “preparing to launch” an investigation into United States detention practices in Afghanistan and potentially at “black sites” established in Poland, Lithuania, and Romania.¹⁶⁷ The ICC appears interested in CIA and Department of Defense activity and whether there was a high-level United States torture policy.¹⁶⁸ How does this relate to sovereign immunity? The United States has never joined the 1998 treaty that created the ICC—the Rome Statute.¹⁶⁹ Because the United States has not participated in the Rome Statute, it has maintained that the ICC lacks jurisdiction over it.¹⁷⁰ Because Afghanistan is a party to the Rome Statute and has acquiesced to ICC jurisdiction, however, the ICC claims to have “jurisdiction over American conduct in Afghanistan.”¹⁷¹ The legal arguments surrounding this issue are beyond the scope of this Note, but, in effect, the ICC is attempting to pierce United States sovereign immunity by exercising its jurisdiction. When the United States is engaged in activities that weaken international principles of sovereign immunity, it weakens its own arguments about jurisdiction and sovereign immunity in foreign courts, like the ICC. It is in America’s self-interest to preserve the principle of sovereign immunity.¹⁷²

¹⁶⁶ David Bosco, *Exclusive: International Criminal Court Poised to Open Investigation into War Crimes in Afghanistan*, FOREIGNPOLICY.COM (Oct. 31, 2016, 4:57 PM), <http://foreignpolicy.com/2016/10/31/exclusive-international-criminal-court-poised-to-open-investigation-into-war-crimes-in-afghanistan/> [<https://perma.cc/6LD8-33UR>].

¹⁶⁷ See *id.*; David Bosco, *US Options for Responding to ICC Scrutiny in Afghanistan*, LAWFARE (Feb. 23, 2017, 12:20 PM), <https://lawfareblog.com/us-options-responding-icc-scrutiny-afghanistan> [<https://perma.cc/594Z-CCZ5>].

¹⁶⁸ See generally Int’l Criminal Court, The Office of the Prosecutor, Rep. on Preliminary Examination Activities, at 43–51 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf [<https://perma.cc/Q2TF-KBFN>] (explaining ICC interest in U.S. actions in Afghanistan).

¹⁶⁹ See *Rome Statute of the International Criminal Court*, 17 July 1998, Subsection of *Treaties, States Parties and Commentaries*, INT’L COMMITTEE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=585#topTable [<https://perma.cc/V8FK-R94Z>] (last visited Oct. 18, 2017) [hereinafter *Parties to Rome Statute*] (listing countries that signed the Rome Statute); see also Discussion of Creation of International Criminal Court, *Rome Statute of the International Criminal Court*, 17 July 1998, Subsection of *Treaties, States Parties and Commentaries*, INT’L COMMITTEE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=FA328E3CB5C34944412566900039ACBB&action=openDocument> [<https://perma.cc/R4P6-EBUJ>] (last visited Oct. 18, 2017).

¹⁷⁰ Abraham Joseph, *Trump Presidency and International Criminal Justice: Should the World Be Ready for a Showdown?*, MODERNDIPLOMACY (Mar. 8, 2017), http://moderndiplomacy.eu/index.php?option=com_k2&view=item&id=2326:trump-presidency-and-international-criminal-justice-should-the-world-be-ready-for-a-showdown [<https://perma.cc/L84T-HUCB>].

¹⁷¹ See Bosco, *supra* note 167; *Parties to Rome Statute*, *supra* note 169.

¹⁷² On November 20, 2017 the chief prosecutor for the ICC formally requested an investigation into alleged war crimes committed by the United States military and CIA in Afghanistan. James

C. Other Ways of Bringing Justice to the 9/11 Families

It is a quintessentially American desire to hold those who cause harm accountable in a court of law, especially with a tragedy of the magnitude that occurred on September 11, 2001. As Terry Strada, the leader of a 9/11 Families & Survivors United for Justice Against Terrorism, put it:

[The passage of JASTA] eases the part where you wake up in the morning and go to sleep at night and you know that the people that killed your husband have completely gotten away with it. And now when I wake up, this morning, I said, the people that killed my husband, they actually will be held accountable. It's a very different feeling. It's a very satisfying feeling, and it's the right thing to do for my children and for our country.¹⁷³

No matter how fulfilling a lawsuit may feel, it is not always the right course of action. Particularly in relation to foreign affairs—lawsuits brought by individual plaintiffs should be considered a last resort for deterring foreign government action. Congress should remember the wide array of existing tools it has at its disposal and not be so quick to erode international immunity in search of an easy fix. “Sanctions, trade embargos, diplomacy, [and] . . . military action” can all be used to protect the American people and deter actions by foreign governments.¹⁷⁴

Since the 9/11 attacks, the executive and legislative branches have taken action to hold accountable those who committed the horrific attacks of that day and to bring some semblance of closure to the families who lost so much. Steps have been taken against Al Qaeda, the terrorist group that planned the 9/11 attacks. For example, President Obama ordered a raid that resulted in the killing of Osama bin Laden, the leader of that group.¹⁷⁵ Legislation has been passed to cover the health benefits for first-responders and survivors of 9/11.¹⁷⁶ And trials continue to play out in military

McAuley, *ICC Prosecutor Seeks Probe Into War Crimes Allegations Against U.S. Military, CIA in Afghanistan*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/world/asia_pacific/icc-prosecutor-seeks-probe-into-war-crimes-allegations-against-us-military-cia-in-afghanistan/2017/11/20/e8ec73b8-ce1e-11e7-a87b-47f14b73162a_story.html. This development makes it even more imperative for the United States to safeguard the principle of sovereign immunity rather than take action to undermine its validity.

¹⁷³ Michel Paradis, *What's Driving the Passion Behind JASTA?*, LAWFARE (Oct. 3, 2016, 9:33 AM), <https://www.lawfareblog.com/whats-driving-passion-behind-jasta> [https://perma.cc/4ZFP-7ELH].

¹⁷⁴ *Evaluating the Justice Against Sponsors of Terrorism Act: Hearing on S. 2930 Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, *supra* note 34, at 36, 40–41.

¹⁷⁵ Macon Phillips, *Osama Bin Laden Dead*, WHITE HOUSE (May 2, 2011, 12:16 AM), <https://obamawhitehouse.archives.gov/blog/2011/05/02/osama-bin-laden-dead> [https://perma.cc/4UPQ-K49A].

¹⁷⁶ Frank Thorp V et al., *Congress Set to Extend Lifetime Health Care Benefits for 9/11 First Responders*, NBC NEWS (Dec. 15, 2015, 10:53 PM), <http://www.nbcnews.com/politics/politics->

tribunals against the masterminds behind the September 11 attacks and other terrorist attacks against the United States.¹⁷⁷ Congress should work to enhance these efforts, build on them, and make them more effective, rather than seek to violate international principles and allow private litigation. Delegating the important task of holding those responsible for 9/11 to private plaintiffs and unelected federal courts is a refrainment of congressional responsibility that will do significant damage to United States interests abroad.

Even if litigation appears to be the best course of action, there may be other ways to achieve results without a wholesale waiver of sovereign immunity. For example, the United States could pressure foreign governments to hold their own citizens accountable, “support international criminal tribunals” in their prosecution of international terrorism, and fund programs aimed at promoting the “international rule of law and victim rehabilitation.”¹⁷⁸ This can all be accomplished without eroding the internationally recognized tenants of sovereign immunity. Briefly, this Note explores two alternatives to seeking justice for the 9/11 families that Congress should consider pursuing. This exploration is not meant to be an exhaustive list but simply to demonstrate the myriad options Congress has at its disposal.

i. Convince Saudi Arabia to Acquiesce to United States Jurisdiction

It is still far from clear as to whether the Saudis played any role in supporting the terrorists who carried out the attacks on 9/11.¹⁷⁹ Nevertheless, this Note does not seek to litigate the culpability of Saudi Arabia, but rather to determine the most effective solution for bringing justice to the victims of terrorism and their families. To that end, a more desirable outcome could be reached if the Saudi government was persuaded to hold itself accountable or to acquiesce to American jurisdiction.

The United States has many tools at its disposal to effectuate such cooperation. For example, the United States currently provides millions of dollars in tax relief to Saudi Arabians by allowing them to conduct investment activities in the United

news/congress-set-extend-lifetime-healthcare-benefits-9-11-first-responders-n480706 [https://perma.cc/FT67-5T85].

¹⁷⁷ See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), <https://www.nytimes.com/2011/04/05/us/05gitmo.html> [https://perma.cc/DY37-953B].

¹⁷⁸ *Evaluating the Justice Against Sponsors of Terrorism Act: Hearing on S. 2930 Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, *supra* note 34, at 41.

¹⁷⁹ See generally 9/11 REVIEW COMM’N, REP. TO DIR. OF THE FED. BUREAU OF INVESTIGATION, THE FBI: PROTECTING THE HOMELAND IN THE 21ST CENTURY 100–07, 117–18 (2015), <https://www.fbi.gov/file-repository/stats-services-publications-protecting-the-homeland-in-the-21st-century> [https://perma.cc/P626-9PCX] (discussing the FBI’s investigation of the 9/11 attack); NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 171 (2004), <https://www.9-11commission.gov/report/911Report.pdf> [https://perma.cc/8PN3-RGZF]. But see Erin Kelly & Ray Locker, *Declassified 9/11 Pages Show Ties to Former Saudi Ambassador*, USA TODAY (July 15, 2016, 5:12 PM), <http://www.usatoday.com/story/news/politics/2016/07/15/28-declassified-pages-911-commission-report-released-public/87134942/> [https://perma.cc/9NFK-6U94].

States through their sovereign wealth fund without tax.¹⁸⁰ In fact, recent reports suggest that the Saudis actually expect to invest much more in the United States, with “plan[s] to grow” their sovereign wealth fund to two trillion dollars.¹⁸¹ Although not all of this money will be invested in the United States, there is reason to believe that much of it will.¹⁸² Such a massive increase in United States investments by the Saudis would make them eligible for monolithic tax breaks and financial savings under current law.

It would be entirely within the norms of international relations to leverage these massive savings the Saudi Arabian government currently receives in order to garner their cooperation. Such action would not carry with it the threat of reciprocal action. The United States currently provides these tax benefits as a matter of statute; thus, they are available to all foreign nations who have sovereign wealth funds, regardless of whether the United States receives a reciprocal benefit.¹⁸³ In fact, many countries do not offer the same benefit to the United States.¹⁸⁴ Precedent also exists for singling out Saudi Arabia as ineligible to receive these tax benefits if it is not willing to cooperate.¹⁸⁵ The threat of such a devastating financial blow to the Saudis would likely be enough to at least bring them to the table to discuss a joint investigation.

Although this may not be an option Congress is willing to pursue, it should be considered. The leveraging of existing financial benefits received by Saudi Arabia does not create the same international concerns that come with an erosion of sovereign immunity, and it targets only the country that JASTA was designed to

¹⁸⁰ See Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 453–56 (2009).

¹⁸¹ See Jonathan Chew, *Saudi Arabia Is Creating a Mega-Fund with More than \$2 Trillion*, FORTUNE (Apr. 1, 2016), <http://fortune.com/2016/04/01/saudi-arabia-fund/> [https://perma.cc/6ZN5-6NT8].

¹⁸² While it is “not entirely clear” where these new funds will be invested, Saudi Arabia has announced that it plans to increase the portion of the funds that are in “foreign investments to 50% by 2020, from 5% now.” Stefania Bianchi, *The Key Questions Asked About Saudi Arabia’s \$2 Trillion Fund*, BLOOMBERG MKTS. (May 26, 2016, 5:20 AM), <https://www.bloomberg.com/news/articles/2016-05-25/key-questions-raised-by-the-2-trillion-saudi-wealth-fund-plan> [https://perma.cc/CZR9-L5H7]. Saudi Arabia has a history of investing in U.S. companies and it is very likely that such investments will continue with an expansion in investment capital. See Mike Isaac & Michael J. de la Merced, *Uber Turns to Saudi Arabia for \$3.5 Billion Cash Infusion*, N.Y. TIMES (June 1, 2016), <https://www.nytimes.com/2016/06/02/technology/uber-investment-saudi-arabia.html> [https://perma.cc/HK55-392C]; Wael Mahdi et al., *Saudi Sovereign Fund Considers Stake in Six Flags*, BLOOMBERG (Feb. 8, 2017, 11:00 PM), <https://www.bloomberg.com/news/articles/2017-02-08/saudi-wealth-fund-pif-said-to-consider-taking-stake-in-six-flags> [https://perma.cc/QG26-EDDA].

¹⁸³ See Jennifer Bird-Pollan, *The Unjustified Subsidy: Sovereign Wealth Funds and the Foreign Sovereign Tax Exemption*, 17 FORDHAM J. CORP. & FIN. L. 987, 1019–20 (2012).

¹⁸⁴ *Id.* at 1019.

¹⁸⁵ It is not unprecedented for the tax code, where these benefits are housed, to single out countries for different treatment. See, e.g., 26 U.S.C. § 999 (2012) (requiring the reporting of boycott requests against certain countries). Although in the case of § 999 the Code singles countries out based on a list maintained by the executive branch, Congress could single out Saudi Arabia directly in the tax code. See *id.* § 999(a)(3).

affect. Such action may further deteriorate the relationship between the United States and Saudi Arabia, but that relationship has been weakening for some time.¹⁸⁶ Regardless, the Saudis rely on us to provide military equipment and support in the Middle East, and any adverse effects that may result would be superficial and unlikely to damage the deeper relationship between our two countries. This is just one of many options the United States has to coerce Saudi Arabia into cooperating with terrorism investigations—even ones that target the Kingdom directly.

ii. Enact Fund for Victims of Terrorism

A distinct alternative for seeking justice for the 9/11 families could come in the form of a terrorism victims' fund for those affected by the September 11 attacks. Although Congress has already passed legislation to pay for health benefits for the survivors of these attacks, they could go even further in creating a fund to compensate victims and families for their loss and suffering.¹⁸⁷ Such a fund could be used to provide money to victims of terrorism while placidly acknowledging the potential culpability of foreign states in the 9/11 attacks. This would be a more informal setting for seeking justice, which could potentially involve back-channel negotiations between the United States and foreign nations such as Saudi Arabia. It may be useful to think of this option as a settlement agreement between two foreign nations, where one does not formally admit their guilt, but provides a mechanism for compensation. The fund may be fronted by the United States government, while behind the scenes another State is providing the remuneration.

This idea is not a radical departure from legislation that Congress has previously passed to ensure justice for victims of terrorism. For example, in 2015 Congress passed a budget bill that created a new “United States Victims of State Sponsored Terrorism Fund.”¹⁸⁸ This fund was designed to provide compensation for the Americans who were held during the 1979 Iranian Hostage Crisis and for other victims of international terrorism who received final court judgments under the FSIA exception for state sponsors of terrorism.¹⁸⁹ In effect, part of this fund

¹⁸⁶ In the words of former U.S. Ambassador to Saudi Arabia, Charles Freeman, Jr., “We’ve seen a long deterioration in the U.S.-Saudi relationship, and it started well before the Obama Administration. The U.S.-Saudi relationship is based entirely on interests, not values. It’s been an impossible relationship in value terms from the beginning.” Doyle McManus, *The Saudi-U.S. Relationship: Shakier than Ever*, L.A. TIMES (Jan. 10, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0110-mcmanus-saudi-us-relationship-20160110-column.html> [<https://perma.cc/XX3M-XPJK>].

¹⁸⁷ See Thorp, et al., *supra* note 176.

¹⁸⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114–113, § 404, 129 Stat. 2242, 3007 (2015).

¹⁸⁹ David M. Herszenhorn, *Americans Held Hostage in Iran Win Compensation 36 Years Later*, N.Y. TIMES (Dec. 24, 2015), <https://www.nytimes.com/2015/12/25/us/politics/americans-held-hostage-in-iran-win-compensation-36-years-later.html> [<https://perma.cc/UXZ7-6SDK>]; Carol Morello & Frances Stead Sellers, *Americans Held in Iran During 444-Day Hostage Crisis Finally Get Compensation*, WASH. POST (Dec. 24, 2015), <https://www.washingtonpost.com/world/national-security/americans-held-in-iran-during-444-day-hostage-crisis-finally-get->

was designed to ease the difficulty of collecting on successful judgments against state sponsors of terrorism by creating a pool of money from which successful litigants could collect a portion of their judgment.¹⁹⁰ However, the portion that was intended for the victims of the Iranian Hostage Crisis was designed to overcome existing agreements that prohibited those victims from bringing suit against Iran.¹⁹¹ In the same way, a new 9/11 victims fund could be established to overcome the international immunity challenges to holding foreign states accountable for their potential involvement in terrorist attacks on United States soil.

Providing money for these families would certainly not address the deep suffering they feel from these attacks, but it could provide some form of meaningful justice. Additionally, the burden of enforcement of any judgment against a foreign sovereign would be shifted from the 9/11 families to the United States government. It is likely that the government would be in a better position to collect monies from these foreign actors than any private citizen. Although the compensation would be paid initially out of the United States Treasury, the United States could use its full array of enforcement techniques to recoup at least a portion of these funds. Because this would involve a foreign state, the United States, seeking compensation from another foreign state, for example, Saudi Arabia, this would not implicate the principles of sovereign immunity.

This is not a new idea. The British government already provides compensation to its citizens who are victims of overseas terrorist attacks.¹⁹² Additionally, in 2003, the Bush Administration proposed a terrorism victim compensation legislation, but the bill did not advance.¹⁹³ This legislation would have provided compensation to victims of the 9/11 attacks equal to the benefits for public safety officers killed in

compensation/2015/12/24/c1054c2e-aa4b-11e5-bff5-905b92f5f94b_story.html
[<https://perma.cc/8CV4-GDF9>].

¹⁹⁰ It is difficult to estimate the amount of outstanding judgments against state sponsors of terrorism, but a 2008 Congressional Research Service report noted that of the more than \$19 billion in awarded judgements against state sponsors of terrorism, only a portion had been able to collect anything. See ELSEA, *supra* note 32, at 67.

¹⁹¹ The Algiers Accords, which was signed by Iran and the U.S. in 1981 and allowed for the release of the hostages, prohibited U.S. nationals from filing claims against Iran in American courts that arose from the hostage crisis. See Jarrett Murphy, *U.S. Hostages Can't Sue Iran*, CBS NEWS (July 1, 2003, 2:12 PM), <http://www.cbsnews.com/news/us-hostages-cant-sue-iran/> [<https://perma.cc/PZ9K-9ZSR>]; Morello & Sellers, *supra* note 189.

¹⁹² See *Compensation for Victims of Terrorist Attacks Abroad*, GOV.UK, <https://www.gov.uk/compensation-victim-terrorist-attack> [<https://perma.cc/BR8R-7PUF>] (last visited Oct. 19, 2017).

¹⁹³ See *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 1–2 (2003); John Bellinger, *Omnibus Bill Creates One Billion Dollar Fund for Victims of Terrorism (and allows up to \$250 Million to Go to Their Attorneys)*, LAWFARE (Dec. 28, 2015, 12:04 PM), <https://www.lawfareblog.com/omnibus-bill-creates-one-billion-dollar-fund-victims-terrorism-and-allows-250-million-go-their> [<https://perma.cc/8LNG-5BVM>] (discussing the compensation amounts the “terrorism victim compensation legislation” would have provided if it had passed).

the line of duty.¹⁹⁴ Rather than eviscerate internationally recognized principles of sovereign immunity, Congress may consider re-examining this legislation and enacting a 9/11 victims fund.

CONCLUSION

While it is hard not to feel sympathy for the families of the victims of September 11, JASTA does not provide them the closure or justice that they need. Every time the United States enacts a new piece of legislation that chips away at the longstanding doctrine of sovereign immunity, we must be mindful of the potential that foreign actors will use our laws as justification to go after our military members, diplomats, and intelligence operatives working on legitimate government missions abroad. “[G]iven this country’s global use of intelligence agents, Special Operations forces and drones, all of which could be construed as state-sponsored ‘terrorism’ when convenient,” it is not far-fetched to believe other countries could turn the precedent set by JASTA against the United States.¹⁹⁵ “[T]errorism is often in the eye of the beholder, and reciprocity need not be precise.”¹⁹⁶ As Senator Cardin (D-MD), the ranking member of the Senate Foreign Relations Committee, put it, “While I have faith and confidence in the American legal system, the same faith does not necessarily extend to the fairness of legal systems of other countries that may claim they are taking similar actions against America when they are not.”¹⁹⁷

While it is true, as the Supreme Court has said, that “foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution,”¹⁹⁸ we must not rescind its protections without careful deliberation of the potential ramifications. Congressional leaders have a duty to reject further assaults on the international principles of sovereign immunity and to work to narrow the scope of JASTA as much as possible to minimize its potential for unintended consequences. Justice has been, and will

¹⁹⁴ *Benefits for U.S. Victims of International Terrorism: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 193, at 5–6 (statement of William H. Taft, IV, Legal Adviser, Department of State). In 2003, that amount was equal to \$262,100; it is now approximately \$344,000. *Public Safety Officers’ Benefits Programs: Benefits by Year*, OFF. JUST. PROGRAMS, https://www.psob.gov/benefits_by_year.html [<https://perma.cc/X9AW-5TN5>] (last visited Oct. 19, 2017).

¹⁹⁵ Editorial Board, *Should We Let 9/11 Victims Sue Saudi Arabia? Not So Fast.*, WASH. POST (Sept. 15, 2016), https://www.washingtonpost.com/opinions/should-we-let-911-victims-sue-saudi-arabia-not-so-fast/2016/09/15/f0067338-791f-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.66376ae780f2 [<https://perma.cc/5PKZ-WDNQ>].

¹⁹⁶ Curtis Bradley & Jack Goldsmith, *Don’t Let Americans Sue Saudi Arabia*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/22/opinion/dont-let-americans-sue-saudi-arabia.html> [<https://perma.cc/H4MC-2Y7Z>].

¹⁹⁷ 162 CONG. REC. S6169 (daily ed. Sept. 28, 2016).

¹⁹⁸ *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

continue to be brought, to the families of 9/11 through actions of the executive and legislative branches.¹⁹⁹

¹⁹⁹ See Message to the Senate Returning Without Approval the Justice Against Sponsors of Terrorism Act, 2016 DAILY COMP. PRES. DOC. 628 (Sept. 23, 2016) (describing executive and legislative branch efforts to pursue justice against Al Qaeda, “the terrorist group that planned the 9/11 attacks,” to kill Osama bin Laden, to enact legislation that covers health benefits for first responders and survivors of 9/11, and to declassify congressional investigation reports related to 9/11).